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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 784

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

ALLEN COLLINS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA RESPONDENT, *Appellant*, versus ALLEN COLLINS, PETITIONER, *Appellee*.	NO. 1200 HABEAS CORPUS.

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.,
HARVEY H. TYSINGER, ESQ.,
Asst. United States Attorney, Atlanta, Ga.
H. T. NICHOLS, ESQ.,
Asst. United States Attorney, Atlanta, Ga.
Attorneys for Appellant,

CLINT W. HAGER, ESQ.,
621 *Atlanta Nat'l Bank Bldg., Atlanta, Ga.,*
Attorney for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Allen Collins, Petitioner, vs. Fred G. Zerbst, Warden United States Penitentiary Atlanta, Georgia, Respondent.	No. 1200 HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, AS AFORESAID.

Comes now Allen Collins, petitioner, of legal age, a citizen of the United States, and within the jurisdiction of this Honorable Court, and applies for writ of habeas corpus, assigning the following reasons for his application:

That he is now being wilfully, unlawfully arbitrarily and illegally restrained of his liberty and is incarcerated and imprisoned in the United States Penitentiary, at Atlanta, Georgia, in violation of the laws and the Constitution of the United States of America, by the Honorable Fred G. Zerbst, Warden of the United States Penitentiary, as aforesaid, all within the jurisdiction of this Honorable Court.

The reasons for the illegal, arbitrary imprisonment of the petitioner are two sentences imposed by the Dis-

trict Court of the United States for the Southern District of West Virginia, and on the illegal, unlawful, arbitrary attempt to extend the punishment directed by the Court and seeking to force the petitioner to serve two sentences contrary to direction of the Court and to force the petitioner to serve the two sentences consecutively with no provision for such service made by the Court in either sentence. See Exhibits submitted in Habeas Corpus number 1168.

The first sentence was imposed upon the petitioner by the District Court of the United States on the 16th day of November, 1932, for a term of three years imprisonment in the custody of the Attorney General of the United States, and has been fully served.

The petitioner was again sentenced by the same Court to be imprisoned for a term of one year and one day and a fine of $100.00, on the 18th day of September, 1935, for which the petitioner was duly committed to the custody of the Attorney of the United States and the same sentence did expire before the 16th day of June, 1937, less regular good time deductions duly earned by the petitioner and provided for by Statute, and an additional 45 days Industrial good time earned by the petitioner in the Industries while serving the last sentence. This should be deducted from the legal expiration date of June 16, 1937, making the sentence expire on the 3rd day of May, 1937, and there being no further legal sentence the petitioner should have been discharged from custody on that date.

The petitioner would show this Honorable Court that he was released from the first sentence by parole

on the 16th day of February, 1934, leaving a balance of twenty-one months of aforesaid sentence not served, which began to run again on the 18th day of September, 1935, when the petitioner was again taken into custody by the Attorney General of the United States on a new charge, said sentence to start on the day it was imposed, in accordance with the judgment of the Court and the laws governing the service of Federal Sentence.

The petitioner would show this Honorable Court that the two sentences were imposed by the same Court and the judgments of the Court do not direct that said sentences are to be served consecutively nor is there any provision for service of said sentence other than the provisions of the law and the general rule on concurrency in the absence of other directions in the judgments of the Court, therefore, the two sentences must be construed to run concurrently.

The petitioner has faithfully served all sentences imposed by the Courts of the United States and seeks relief from further illegal, unlawful, arbitrary imprisonment by writ of habeas corpus.

WHEREFORE: Petitioner prays this Honorable Court to issue a writ of Habeas Corpus, from and under the seal of this Honorable Court, directed to the Honorable Fred G. Zerbst, Warden of the United States Penitentiary, at Atlanta, Georgia, the respondent to this petition, to have the petitioner before this Honorable Court at such time and place as this Honorable Court may direct, and make an order directing the respondent to this petition to release your petitioner upon such terms and conditions as required by

law, and as may be ordered by this Honorable Court, that the petitioner may have his liberty to go hence without delay, as in duty bound he will ever pray, etc.

ALLEN COLLINS, No. 46779-A, *Petitioner.*

AFFIDAVIT

STATE OF GEORGIA)
) ss
COUNTY OF FULTON)

Personally appearing before me Allen Collins, who being duly sworn, deposes and says: that he has read the contents of the foregoing petition and that he fully understands the allegations therein contained, that he believes them to be true, and that he believes he is entitled to the redress sought therein so that full and complete justice may be done in the premises.

ALLEN COLLINS, *Petitioner.*

Sworn to and subscribed before me this 28th day of April, 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

AFFIDAVIT IN FORMA PAUPERIS

Petitioner being duly sworn, deposes and says that he is a citizen of the United States, of legal age,

and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Georgia, and within the jurisdiction of this Honorable Court; that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention; but that because of his poverty he is unable to pay the costs of the said action or to give security for same, and that he believes he is entitled to the redress he seeks therein.

WHEREFORE: Petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without cost.

ALLEN COLLINS, *Affiant.*

Sworn to and subscribed before me this 28th day of April 1937.

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

ORDER GRANTING WRIT IN FORMA PAUPERIS

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 8th day of MAY, 1937.

This the 4th day of MAY, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed in Clerk's Office
United States District
Court, Northern Dis-
trict of Georgia,

May 4th, 1937.

J. D. STEWARD, *Clerk,*
By W. L. NEESE, *Deputy Clerk.*

(TITLE OMITTED)

ANSWER

Now comes the respondent in the above entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the South-

ern District of West Virginia, directing the imprisonment of petitioner for a term of three years. Respondent attaches hereto and makes a part of this response conduct record sheet of petitioner showing computation of his terms of servitude.

It will be noted that petitioner was on Nov. 17, 1932, sentenced to serve three years, on which date his sentence commenced. On Feb. 16, 1934, petitioner was released on parole. While on parole a second sentence was imposed upon petitioner for a term of one year and one day on which day this sentence began to operate. Said sentence of one year and one day is silent as to sequence of service. This sentence with good time deduction expired on June 25, 1936, with the exception that petitioner is required under it to serve an additional thirty days for non-payment of fine.

On Oct. 3, 1935, a parole warrant issued for petitioner, copy of which is hereto attached and made a part of this response. On Sept. 21, 1936, his parole was revoked as is evidenced by certificate of revocation dated Sept. 21, 1936, a copy of which is also attached hereto and made a part of this response. By direction of the Bureau of Prisons in letter dated Nov. 2, 1935, a copy of which is hereto attached and made a part of this response, said parole warrant was lodged against petitioner as a detainer, and he was taken into custody under it at the expiration of the sentence of one year and one day. Said letter further ordered that petitioner be listed for hearing on the violation charge only after he is in custody under said warrant, and that the original warrant be re-

turned to the Bureau with the statement specifically that respondent is holding Collins on the original commitment and as a violator of parole.

Respnndent says that the foregoing account states the basis for the detention of petitioner, but that, in any event, the case is not ripe for decision at this time, and even taking petitioner's theory of the case, he will not be eligible for discharge from custody until June 16, 1937. Upon the first sentence of three years, petitioner had, at the time of his reincarceration, 638 days remaining to be served. If the first sentence be tacked to the second sentence, and said 638 days be computed as commencing from June 26, 1936, his full term would expire March 25, 1938. If, however, it be considered as running concurrently with the term last imposed, said 638 days, computed as starting on Sept. 18, 1935, would expire, as is stated above, on June 16, 1937.

Respondent further says that the earliest time discharge could possibly be had is approximately six months distant, and prays that the cause not be allowed to remain pending on the dockets for this period, but that it be dismissed without prejudice to the right of petitioner to file a new application, and again raise the question just a short time prior to the time when the cause of action will ripen. Respondent particularly prays the consideration of the court in this respect in view of the fact that a test case involving the exact point is now pending in the U. S. Circuit Court of Appeals, 5th Circuit, to wit: *Aderhold,*

Warden v. Ingram, and said appeal will undoubtedly be determined during the spring term of said court at New Orleans.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney.

CONDUCT RECORD

UNITED STATES PENITENTIARY
ATLANTA, GEORGIA

Record of Allen Collins Color White No. 46779 Crime Illicit Distilling, etc. Sentence 4 years 1 day. Fine $100.00 Cost Committed S-W-Va-Charleston. Received Sept. 25, 1935. Nov. 17, 1932. Where convicted S-W-Va-Huntington. Senteneed Sept. 18, 1935. Nov. 17, 1932. Occupation Miner (Coal) Age 53 Sentence commences Sept. 18, 1935. Full term expires March 25, 1938. Residence Champmansville, W. Va. Action of Parole Board Dec. 13, 1933. DENIED Sept. 21, 1936; Parole revoked, earns no good time. WANTED (a) As Parole Violator under Register No. 422020A Previous Criminal Record 11-17-32: As No. 42202 sentenced to 3 years. 3-25-33: Transferred to FPC No. 1. 2-16-34: Paroled from there. 9-18-35; Sentenced to 1 year and 1 day. 9-25-35: Rec'd here as No. 46779. Sentence expired 6-25-36. Has 30 days to serve for fine. 10-3-35: Parole violator warrant issued as No. 42202. Has 638 days to serve effective from 6-26-36.

MITTIMUS

IN THE DISTRICT COURT OF THE
UNITED STATES
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

THE UNITED STATES
vs.
ALLEN COLLINS
} Indictment No. 6323

The defendant, Allen Collins, having been tried and found guilty as charged in the said Indictment for Ill. Dist. etc., it was ordered that he be fined the sum of $100.00, and no costs, and be confined and imprisoned in the United States Penitentiary at Atlanta, Georgia, for the period of One Year and one day, and until said fine is paid.

Therefore, this is to command the Marshal of this District to take the body of the said Allen Collins and commit the same pursuant to the above sentence.

WITNESS the Honorable Elliott Northcott, sitting by designation as Judge of the District Court of the United States for the Southern District of West Virginia, this 18th day of September, 1935,

and in the 160th year of the Independence of the United States of America.

Attest:

IRA H. MOTTESHEAD, *Clerk*
D. C. U. S., S. D. W. Va.

THIS PRISONER HAS BEEN IN MY CUSTODY FROM DATE OF MITTIMUS.

GEORGE P. ALDERSON,
U. S. Marshal.

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

THE UNITED STATES BOARD OF PAROLE

To any Federal Officer Authorized to Serve Criminal Process Within the United States:

WHEREAS, Bill Collins, No. 1797-E was sentenced by the United States District Court for the Southern District of West Virginia to Serve a sentence of three years ——— months, and ———. days for the crime of Illicit Distilling and was on the 16th day of February, 1934, released on parole from the Federal Correctional Camp, Fort Eustis, Virginia.

AND, WHEREAS, satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is declared to be a fugitive from justice;

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Bill Collins,

wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this third day of October, 1935.

ARTHUR D. WOOD,
Chairman S. Board of Parole

U. S. Penitentiary, Atlanta, Ga.
June 25, 1936

The within named prisoner held in custody under this warrant from this date to serve 638 days, the remainder of the parole delinquent sentence mentioned herein.

A. C. ADERHOLD, *Warden.*

Arthur D. Wood, *Chairman* — Ray L. Huff
Charles Whelan, *M. D.* — *Parole Executive*
T. Webber Wilson

DEPARTMENT OF JUSTICE

United States Board of Parole

Washington

CERTIFICATE OF REVOCATION

The United States Board of Parole has heard the case of Allen Collins, Register No. 46779-A, United States Penitentiary, Atlanta, Georgia, (Paroled from Federal Correctional Camp, Fort Eustis, Virginia, No. 1797-E) in the matter of violation of parole, and on the

date of this certificate has ordered that the parole heretofore granted (or imposed by Public 210, 72nd Congress) be revoked, and that this prisoner serve the remainder of his sentence originally imposed, as is provided by law.

In witness whereof this certificate bearing the Seal of the United States Board of Parole is issued.

FOR THE UNITED STATES BOARD OF PAROLE:

RAY L. HUFF,
Parole Executive.

Septemer 21, 1936.

(SEAL)

LETTER CARR, ACTING PAROLE EXECUTIVE, OF NOVEMBER 2, 1935.

SANFORD BATES, DIRECTOR

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON

November 2, 1935.

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Georgia.

In re: Allen Collins, Reg. No. 46779-A.

Former name and number,

Bill Collins, No. 1797-E ZW

Dear Sir:

Enclosed herewith is parole violator warrant in duplicate, together with copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer, and take subject into custody on the warrant at the expiration of his present sentence.

Collins should be listed for hearing on the violation charge only after he is in custody on this warrant.

When you have executed the warrant, please return the original to this office and state specifically that

you are holding Collins on the original commitment and as a violator.

Very truly yours,

RUBY M. CARR,
Acting Parole Executive.

Enc.

Filed Dec. 19, 1936.

(TITLE OMITTED)

ORDER SUSTAINING WRIT AND DISCHARGING PETITIONER

This case came on for hearing and evidence was introduced, argument had and the case considered.

Petitioner filed a former application for writ of habeas corpus in this Court upon the same grounds as set out in the present petition. The writ issued in the former case, however, was discharged because premature, but without prejudice to bringing this proceeding.

As part of the evidence in this case the certified copies of the indictment, sentence and mittimus attached as exhibits to petitioner's former application for writ of habeas corpus were introduced, and there was also introduced in evidence the response filed in the previous application for writ of habeas corpus, with exhibits attached, consisting of the penitentiary con-

duct record sheet of petitioner, the commitment of petitioner to the Atlanta Penitentiary, warrant of arrest of the United States Board of Parole, and a letter of Parole Executive dated November 2nd, 1935.

Upon consideration of the documentary evidence and the parole evidence introduced at the trial, the Court finds that if petitioner's claim that the two sentences ran concurrently is correct, then petitioner's detention is unlawful and he should have been discharged from custody on May 3rd, 1937.

Upon authority of the case of *Kidwell v. Zerbst, Warden,* No. 1192, decided by this Court on May 13th, 1937, the Court finds, the two cases involving substantially the same issues, that the two sentences involved in this case ran concurrently for the reasons set out in the opinion and order of the Court in the Kidwell case.

Whereupon it is considered, ordered and adjudged that the writ of habeas corpus be and is hereby sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This the 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed May 14th, 1937.

(TITLE OMITTED)

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named respondent, F. G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 14th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith; and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney
HARVEY H. TYSINGER,
Assistant U. S. Attorney.
H. T. NICHOLS,
Assistant U. S. Attorney.
Counsel for Respondent

Filed May 14, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. IT IS FURTHER ORDERED that pending the determination of this appeal, appellee shall be released on bail in the sum of $100.00, without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 14, 1937.

(TITLE OMITTED)

ASSIGNMENT OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney, and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 14th day of May, 1937, is erroneous.

(1). Because the court erred in ruling that the terms

of petitioner's sentences shall run concurrently instead of consecutively.

(2). Because the Court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the

prisoner and to compel execution of the unexpired portion of the parole sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the answer of the respondent and the amendment to the answer, the court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

WHEREFORE the Respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of Respondent.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Filed May 14th, 1937.

(TITLE OMITTED)

JUDGE'S CERTIFICATE AS TO THE EVIDENCE

I, E. Marvin Underwood, do hereby certify that at the trial of the above-stated cause, there was nothing before the court except the petition for habeas corpus with exhibit attached together with the testimony of Ben F. Bates that he is Record Clerk of the United

States Penitentiary at Atlanta, Ga., and that, according to his records, if the two sentences of petitioner be computed as running concurrently, or, in other words, if the contentions set forth in the application for habeas corpus are correct, then petitioner would have been entitled to release from custody on May 3, 1937. Said pleadings and exhibit and the said testimony of Ben F. Bates are hereby settled as the evidence in the case.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 18, 1937.

(TITLE OMITTED)

PRAECIPE

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.

2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of court of May —, 1937.

4. Petition for appeal and order of court allowing same.

5. Judge's Certificate as to the evidence.

6. The assignment of errors.

7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent

Filed May 14, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
NORTHERN DISTRICT OF GEORGIA)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing 19 pages

contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA
RESPONDENT, *Appellant*,
versus
ALLEN COLLINS, PETITIONER, *Appellee*,

as specified in the praecipe of the counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 25th day of May, A. D., 1937.

J. D. STEWARD,
Clerk, United States District Court,
Northern District of Georgia,

By
C. A. McGrew, *Deputy Clerk.*

(SEAL)

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

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That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

ALLEN COLLINS

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary.

The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932, (47 Stat. 381; 18 U. S. C. A. 716b) prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920, (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. White vs. Kwiatkowski, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. Aderhold vs. McCarthy, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon Anderson vs. Corall, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In Anderson vs. Corall, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October, 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920 the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It cannot be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody, the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In Hill vs. Wampler, 298 U. S. 460–465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the

prisoner is returned to custody. Cf. Escoe vs. Zerbst, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and

if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

ALLEN COLLINS

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 24 to 36 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8477, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Allen Collins, is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 23 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938